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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 684

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

RICHARD J. REYNOLDS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-  
CUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO REVERSE

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, moves that the judgment of the court below in the present case be reversed, upon the authority of *Maguire v. Commissioner*, No. 346 this Term, *Helvering v. Gambrill*, No. 472 this Term, and *Helvering v. Campbell* and related cases, Nos. 473, 474, and 475 this Term, all decided March 31, 1941.

This case involves two questions: (1) Whether, under Section 113 (a) (5) of the Revenue Act of

1934, the basis for securities which passed to respondent from his father through a testamentary trust is their value at the date of the father's death, as the Government contends, or their value at the date of delivery by the trustee to respondent. (2) Whether the basis for other securities which were purchased by the testamentary trustee and subsequently delivered to respondent is their cost to the trustee, as the Government contends, or their value at the date of delivery by the trustee to respondent.

Both of these questions are, it is submitted, resolved in the Government's favor by the cases above cited.

## I

1. Respondent conceded below (R. 44) that his basis for the property passing to him from his father through the testamentary trust was its value at the time of his father's death, if he had a vested interest in the property under his father's will. All that respondent contended, and all that the court below held, was that his interest was contingent rather than vested, and that respondent's "acquisition" for basis purposes, therefore, did not occur until the contingency took place. This contention that the result turns on whether respondent's interest under his father's will was vested or contingent is now squarely foreclosed by the decisions in the *Campbell* and *Maguire* cases. See also *Helvering v. Hallock*, 309 U. S. 106; *Van Vranken v. Helvering*, 115 F. (2d)

709 (C. C. A. 2d), pending on petition for certiorari, No. 836 this Term.

2. The question here of respondent's basis for the property coming to him from his father is the same as one of the questions decided in the *Maguire*, *Gambrill*, and *Campbell* cases, except that the present case involves the Revenue Act of 1934 while those cases arose under the revenue acts of 1928 and 1932. Section 113 (a) (5) of the Revenue Act of 1934, and the comparable provisions of all other revenue acts since the 1921 act, with the exception of the 1928 and 1932 acts, provide that the basis for property "acquired by bequest, devise, or inheritance \* \* \* shall be the value of such property at the time of such acquisition." Section 113 (a) (5) of the 1928 and 1932 acts provides, on the other hand, that the basis for general bequests "acquired either by will or by intestacy" shall be the value "at the time of the distribution to the taxpayer." In the *Maguire* and other cases, the Court held that under the 1928 and 1932 acts the basis for property passing to a taxpayer from the decedent through a testamentary trust is the value of the property at the time it was distributed by the executors to the trustees, and not its value when it was distributed by the trustees to the taxpayer. The Court held, in other words, that the "distribution" referred to in the acts is the distribution made out of the estate, and not any subsequent transmission.

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In reaching this conclusion the Court first decided in the Government's favor the question presented in the present case, that is that the date of death was the time of "acquisition" under the acts other than those of 1928 and 1932, and then considered the question of how great a departure from this rule was indicated under the 1928 and 1932 acts by the phrase "time of the distribution"; the Court repeatedly stated that its inquiry was the extent of the 1928 departure from the "value-at-death rule." *Maguire* opinion, pp. 3-4. Too, the Court relied on *Brewster v. Gage*, 280 U. S. 327, which held under the earlier acts that the date of death was the date of "acquisition" in the case of a residuary legatee who received the property directly from the executors. *Maguire* opinion, p. 5. Obviously, *Brewster v. Gage* is even more apposite here. Again, the legislative history of the reversion in the 1934 act to the form of the pre-1928 acts, set out in the *Maguire* opinion, p. 4, note 10, requires resolution of the present question in favor of the Government. Finally, the arguments in the *Maguire* opinion, p. 5, that Congress cannot have intended "to allow trustees either to sell the property or to distribute it in kind, as would be most advantageous for tax purposes" or "to create substantial periods of time following the date of death during which the value of the property bequeathed would have no incidence as respects subsequent gains or losses," are equally applicable to the present case.

3. This Court's decision in the *Gambrill* case is even more conclusive of this phase of the present case than is the *Maguire* decision. Section 101 (c) (8) of the Revenue Act of 1928 defines capital assets as "property held by the taxpayer for more than two years." In the *Gambrill* case the Court held that the two-year holding period under this section is to be measured from the date of the decedent's death, in the case of property which was owned by the decedent and which passed to the taxpayer through a testamentary trust, and not from the date of delivery by the trustees to the taxpayer. And in *McFeely v. Commissioner*, 296 U. S. 102, 109, relied on in the *Gambrill* decision, the Court held that "The date for ascertaining the basic value, and the date of commencement of the two year holding period were, therefore, under these Acts [i. e., the acts before 1928], identical."

4. This Court's decision in the *Campbell* and related cases is also independently conclusive of the present case. There the Court held that for purposes of the "first-in-first-out" rule the date of death was "the date of acquisition" for shares which came to the taxpayer from the decedent through a testamentary trust. It seems quite clear that "acquisition" for basis purposes under the acts other than 1928 and 1932 occurs at the same time as acquisition for purposes of the "first-in-first-out" rule.

## II

The second question here presented has been resolved in the Government's favor by the *Maguire* decision. There the Court held that securities purchased by testamentary trustees were not acquired "by will or by intestacy" within Section 113 (a) (5) of the 1928 act, and that therefore their basis was "cost" under Section 113 (a). While the 1934 act (and the acts before 1928) employs the phrase "by bequest, devise, or inheritance," these words are plainly synonymous with "by will or by intestacy." The title of Section 113 (a) (5), "Property transmitted at death," relied on in the *Maguire* decision (p. 6), is the same in both acts, and the different terminology in the 1928 act is obviously but a chance result of the rephrasing incident to according separate treatment to realty and to specific bequests of personality.

Respectfully submitted.

FRANCIS BIDDLE,  
Solicitor General.

APRIL 1941.

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